

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

RIPTA

)

)

VS.

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W.C.C. 2008-03418

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ALBERT CHACE

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DECISION OF THE APPELLATE DIVISION

OLSSON, J. This matter is before the Appellate Division on the employer's appeal from the dismissal of its petition to review which sought to set an earnings capacity based on a labor market survey pursuant to R.I.G.L. § 28-29-2(1986). After a thorough review of the record and consideration of the arguments of the respective parties, we grant the employer's appeal, vacate the order of the trial judge, and remand the matter for trial on the employer's petition.

The employee suffered a knee injury on September 7, 1988 during the course of his employment with RIPTA. He has received workers' compensation benefits under a memorandum of agreement for over twenty (20) years. In 2008, the employer filed a petition to review seeking to set an earnings capacity based on a labor market survey pursuant to R.I.G.L. § 28-29-2. Prior to the taking of any testimony, the employee filed a motion to dismiss claiming that the relief sought in the petition was not available under the version of R.I.G.L. § 28-29-2 in effect at the time of his injury. Specifically, the employee argued that the only basis for setting an earnings capacity regarding an injury which occurred in 1988 was proof that an employee had refused an offer of suitable alternative employment.

The employer filed an objection to the motion to dismiss. At the hearing on the motion, the focus of the argument was whether the statute was substantive or procedural and could be applied retroactively. Both parties and the trial judge proceeded under the mistaken belief that the statute was amended in 1990 to allow establishment of an earnings capacity based on proof that an employee was capable of alternative employment and evidence, such as a labor market survey, that work of that type was available in the community. The parties agreed that the provision was substantive in nature and, as such, the trial judge concluded that any amendments could not be applied retroactively. The motion to dismiss was granted and the employer claimed an appeal.

The parameters of the Appellate Division's scope of review of a decision rendered by a trial judge are set forth in R.I.G.L. § 28-35-28(b) which states that "[t]he findings of the trial judge on factual matters shall be final unless an appellate panel finds them to be clearly erroneous." An alleged error of law is clearly subject to *de novo* review by the appellate panel.

On appeal, the employer asserts that the trial judge erred in dismissing its petition on the grounds that, at the time of employee's injury in 1988, R.I.G.L. § 28-29-2 did permit the court to set an earnings capacity based upon evidence that the employee was capable of alternative employment and proof that such employment was available in the community. The employer's representation is correct.

The statute was amended in 1984 to read in pertinent part:

"Earnings capacity can also be established by the commission based on medical evidence that an employee is capable of performing suitable alternative employment and clear and convincing evidence that work of that type is available in the community. Provided, however, if the employee proves by clear and convincing evidence that he or she has made substantial efforts to find said employment and has been unsuccessful, then the commission can find that the employee has no earning capacity."

P.L. 1984, ch. 142, art. 5, § 7. The basis for the trial judge's dismissal of the petition, that the version of § 28-29-2 in effect at the time of the employee's injury in 1988 permitted the setting of an earnings capacity only upon proof of refusal of an offer of suitable alternative employment, was clearly wrong as a matter of law. In accordance with the version of § 28-29-2 in effect at the time of the employee's injury in 1988, the employer's petition requesting that an earnings capacity be set based upon a labor market survey presented a legally cognizable claim which should have proceeded to trial.

The employee contends that the employer waived its right to appeal on the basis that the trial judge relied upon the incorrect version of § 28-29-2 in dismissing the petition because the employer did not bring the correct version to the attention of the trial judge during the hearing on the motion. We find this argument to be without merit. The motion to dismiss stated that the employee was arguing that the version of the statute in effect in 1988 did not provide for the relief sought in the employer's petition. The employer filed a written objection to the motion to dismiss. The statute in question, § 28-29-2, was the subject matter of the hearing on the motion before the trial judge. Under the circumstances, we believe that the issue, whether the correct statute was properly applied, was adequately preserved for our review.

Furthermore, we believe that it is incumbent upon this panel to address what is clearly an incorrect result and which merely requires that we examine the correct version of the statute. The Rhode Island Supreme Court has upheld the authority of the Appellate Division to correct clear errors in a trial decree in order to bring it into compliance with the provisions of the Workers' Compensation Act. *See Callaghan v. R.I. Occupational Info. Coordinating Comm.*, 704 A.2d 740, 742-743 (R.I. 1997); *Forte v. Fernando Originals, Ltd.*, 667 A.2d 780, 782-783 (R.I. 1995). Fundamental justice requires that this error be corrected.

Therefore, the employer's appeal is granted, the order of the trial judge dismissing the petition is hereby vacated, and the matter is remanded to the trial judge for trial on the employer's petition to review. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed shall be entered on

Hardman and Ferrieri, JJ. concur.

ENTER:

Olsson, J.

Hardman, J.

Ferrieri, J.

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FINAL DECREE OF THE APPELLATE DIVISION

This matter came on to be heard before the Appellate Division on the appeal of the petitioner/employer and upon consideration thereof, the appeal is granted, and in accordance with the decision of the Appellate Division, the following findings of fact are made:

1. That the allegation contained in the employer's petition to review, requesting that the court set an earnings capacity for the employee based upon a labor market survey, presented a legally cognizable claim pursuant to the version of R.I.G.L. § 28-29-2 in effect on the date of the employee's work-related injury, September 7, 1988.

It is, therefore, ordered:

1. That the order entered by the trial judge on December 2, 2008 dismissing the employer's petition is hereby vacated.

2. That the matter is remanded to the trial judge for the purpose of conducting a trial on the employer's petition to review.

Entered as the final decree of this Court this day of

PER ORDER:

John A. Sabatini, Administrator

ENTER:

Olsson, J.

Hardman, J.

Ferrieri, J.

I hereby certify that copies of the Decision and Final Decree of the Appellate Division were mailed to Michael Wallor, Esq., and Jack DeGiovanni, Esq. on